Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-594

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

RITTER TRANSPORTATION, INC., *et al.*

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fifth Circuit

BRIEF OF RESPONDENT RITTER TRANSPORTATION, INC., IN OPPOSITION

Wilmer B. Hill

CHESTER A. ZYBLUT
Attorney for Ritter Transportation, Inc.
3[illegible] Executive Building
1030 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 296-3555

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	4
CONCLUSION	6
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Allen v. *McCurry*, ___U.S. ___, 101 S.Ct. 411, 414-15 (1980)	4
American Trucking Associations, Inc. v. *ICC*, 659 F.2d 452 (5th Cir. 1981); 669 F.2d 957 (5th Cir. 1982)	*passim*
Descriptions in Motor Carrier Certificates, 61 M.C.C. 209; 61 M.C.C. 766	3
Interstate Commerce Commission v. *Steere Tank Lines, Inc., et al.*, S.Ct. No. 82-41	4
Montana v. *United States*, 440 U.S. 147, 153 (1979)	4, 5
Parklane Hosiery Co., Inc. v. *Shore*, 439 U.S. 322, 326 n.5 (1979)	4
Ritter Transportation, Inc. v. *ICC*, 684 F.2d 86 (D.C. Cir. July 27, 1982)	3, 5
Ritter Transportation, Inc. v. *ICC*, No. 82-1023 (D.C. Cir., decision dated January 14, 1983)	5
Steere Tank Lines, Inc. v. *ICC*, 666 F.2d 255 (5th Cir. 1982)	3
United States v. *Hancock Truck Lines*, 324 U.S. 774 778-80 (1945)	5
STATUTES:	
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-594

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

RITTER TRANSPORTATION, INC., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF RESPONDENT RITTER TRANSPORTATION, INC., IN OPPOSITION

STATEMENT

By application filed March 12, 1981, Port Norris Express Co., Inc., pursuant to restriction removal regulations promulgated by the Interstate Commerce Commission,[1] sought to expand the scope of its Sub-No. 16 certifi-

---

[1] The Commission's restriction removal regulations, codified at 49 C.F.R. Part 1137 *et seq.*, purported to implement the Motor Carrier Act of 1980. Pub. L. No. 96-296, 94 Stat. 793, 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). Those regulations, however, were overturned by another panel of the Fifth Circuit court of appeals which found that the asserted guidelines were in fact binding rules which exceeded the Commission's statutory authority. *American Trucking*

cate. The Sub-No. 16 certificate authorizes Port Norris Express to transport one commodity, namely, "cullet," in bulk, non-radially between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and the District of Columbia.[2] Relying on the Commission's restriction removal regulations, Port Norris sought to broaden the commodity description from one commodity, "cullet," in bulk, to "all commodities in bulk",[3] within the area heretofore mentioned.

In a decision served June 5, 1981, the Commission's Restriction Removal Board, over timely objections by Ritter Transportation, Inc., concerning the reasonableness of the proposed expansion, granted the application based upon the restriction removal regulations which were on appeal in *American Trucking Associations, supra*. Ritter Transportation filed an administrative appeal to no avail as Division 2, Acting as an Appellate Division, denied the stay and rejected the appeal.

Associations, Inc. v. *ICC*, 659 F.2d 452 (5th Cir. 1981) (the "ATA case"). Subsequently, that court issued a writ of mandamus to enforce its prior final opinion. *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1981), now pending on petition for a writ of certiorari as *Interstate Commerce Commission* v. *American Trucking Associations, Inc., et al.*, No. 82-86 (filed on July 9, 1982).

[2] The Commission, in the Sub 16 proceeding, found Port Norris fit, willing and able to transport only cullet, in bulk.

[3] The new authority, absent a finding of fitness, would allow Port Norris to transport, for example, hazardous materials, such as LPG, cryogenics, acids, corrosives, along with chemicals, petroleum products, liquid sweeteners, vegetable oils, et al. It would also allow Port Norris to transport numerous dry bulk commodities, including sugar, fertilizer, dry chemicals, salt, lime, sand, gravel, et al.

Ritter noted an appeal, which was docketed No. 81-2116. The United States Court of Appeals for the District of Columbia Circuit, in *Ritter Transportation, Inc.* v. *Interstate Commerce Commission*, 684 F.2d 86 (D.C. Cir. July 27, 1982), vacated the order under review and remanded the proceeding to the Commission for further proceedings consistent with its opinion. The Court held that the decision was arbitrary because the Commission failed to consider the relevant factor of whether Port Norris was "fit, willing and able" to perform the expanded service. Absent such a consideration, it cannot be said that the Interstate Commerce Commission "*reasonably* broadened" the categories of property authorized by the applicant's certificate. The Court, while agreeing with the holding in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1982), has, in effect, found that an expansion from one commodity (cullet), in bulk, to all commodities in bulk cannot be a reasonable expansion under the statute unless the applicant demonstrates and the Commission finds that the applicant has shown itself to be fit, willing and able to transport all possible groups of commodities that would be authorized under the expanded authority. The Court noted that the Interstate Commerce Commission retains broad discretion, within statutory limits, to define appropriate commodity categories.[4] No petition for rehearing was filed by the Commission to the decision of the Court.

---

[4] The Commission's guidelines that specifically named commodities could be expanded from three different sources, namely, (1) The Standard Transportation Commodity Code (STCC); (2) other classifications set out in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 61 M.C.C. 766; or (3) any broader class description

The decision of the Court of Appeals is correct and plenary review by this Court is not warranted.

ARGUMENT

1. On petition, the Commission states that the reasons for granting this petition are noted in its *Petition for a Writ of Certiorari in Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41, filed July 9, 1982, which involves identical issues (Pet. 6). Central to the Commission's petition in this and No. 82-41 is that the Court of Appeals erred in requiring the Commission to make findings in restriction removal applications that an applicant demonstrate that it is fit, willing and able to perform the proposed service (Pet. 6). This issue is not subject to review. The issue has been laid to rest in the *ATA* case, *American Trucking Associations, supra.*, 659 F.2d at 464.[5]

The Commission's attempt to litigate this issue in this case is nothing more than an impermissible collateral attack on the *ATA* case. This Court has consistently recognized that a court should refuse to review an issue framed in an attempt to overturn a previous conclusive judgment on the same issue. *Allen* v. *McCurry*, ___ U.S. ___, 101 S.Ct. 411, 414-15 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). The Commission's rights on this issue were determined at the

---

the Commission may have accepted in the past. Under (1) above, cullet would come within the STCC code of clay, concrete, glass or stone products.

[5] The opinion at 659 F.2d 452 is not subject to review pursuant to 29 U.S.C. 2101(c) because the Commission failed to file a timely petition seeking certiorari.

time the court of appeals decided *ATA*, and thus the agency was required to seek further review of that decision if it desired to urge any error. *See United States* v. *Hancock Truck Lines*, 324 U.S. 774, 778-80 (1945).

Moreover, the court of appeals for the District of Columbia Circuit was entitled to rely upon the finality of the original decision in *ATA* in reaching its subsequent decisions in this case. The Commission clearly was aware that the Commission's time for seeking further review of *ATA* had expired. Sound judicial policy demands that a court of appeals should follow established precedent, especially that within its own circuit. *Montana*, *supra*, 440 U.S. at 153-54.

2. The only other contention raised by the Commission is that the court of appeals improperly substituted its judgment for the agency's as to what constitutes a reasonable broadening of certificates under the statute (Steere Pet. 12-14). The lower court considered *only* the record before it. In so doing, it concluded that the term "reasonably broaden," as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing and able." The lower court concluded that the "record contains no evidence" to show that Port Norris had made "prima facie showing in its application that it is fit, willing, and able" to transport "all" bulk commodities. Thus, contrary to the Commission's assertion, the court of appeals did not broaden its original decision in the *ATA* case, but simply followed it. *Compare American Trucking Associations*, *supra*, 659 F.2d at 464.[6]

---

[6] Moreover, there is consistency in the circuits which have considered the reasonableness of Commission actions permitting broadening of commodity descriptions. *Ritter Transportation, Inc.* v. *ICC*, 684 F.2d 86 (D.C. Cir. July 27, 1982), and *Ritter Transportation, Inc.* v. *ICC*, No. 82-1023 (D.C. Cir., decision dated January 14, 1983).

The Commission deliberately misreads the court's decision by asserting that expansion from one commodity to all commodities within a broad description is foreclosed "as a matter of law" (Pet. 6). As demonstrated by the remand, the court expressly left for the Commission's determination what factual showing of fitness, willingness, and ability is necessary to support the ultimate grant of authority. Consequently, the court of appeals has not in any manner infringed upon the Commission's discretion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHESTER A. ZYBLUT
366 Executive Building
1030 Fifteenth St., N.W.
Washington, D.C. 20005
Counsel for Ritter Transportation, Inc.

January 1983

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2116

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

---

Argued May 21, 1982
Decided July 27, 1982

Judgment entered this date ←

Michael D. Bromley with whom *Chester A. Zyblut* was on the brief, for petitioner.

Colleen J. Bombardier, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

respondents. *John Broadley*, Attorney, Interstate Commerce Commission also entered an appearance for respondent Interstate Commerce Commission. *Robert B. Nicholson* and *George Edelstein*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

William P. Jackson, Jr. was on the brief, for intervenor.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *Senior District Judge*: Ritter Transportation Inc. seeks to review and set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co. Inc. to broaden the commodities authorized in its certificate of public convenience and necessity. A certificate issued in 1973 authorized Fort Norris to transport "cullet in bulk" (broken glass) between points in 12 states and the District of Columbia. Following the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), the ICC, pursuant to the Act and rules and guidelines promulgated by the Commission, granted Port Norris' application to broaden its authority to "commodities in bulk". Ritter contends, *inter alia*, that the Commission arbitrarily failed to consider whether Port Norris is "fit, willing, and able" to transport "commodities in bulk". For the reasons set forth below we vacate the ICC's order granting Port Norris' application and remand to the Commission for further proceedings.

The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit. . . ." 49 U.S.C.A. § 10922 (h) (1) (B) (i) (West. Supp. 1981) (emphasis added). However, as noted by the Fifth Circuit Court of Appeals,

> In mandating the removal of unreasonable restrictions, the statute does not dispense with the [Act's] primary requirement that every carrier be "fit, willing and able to provide the transportation to be authorized by the certificate." [42 U.S.C.A. § 10922 (a) (1) (A) (West Supp. 1981)].

American Trucking Associations, Inc. v. *I.C.C.*, 659 F.2d 452, 464 (5 Cir. 1981).

In *Steere Tank Lines, Inc.* v. *I.C.C.*, 666 F.2d 255 (5 Cir. 1982) (*"Steere I"*), the court reviewed an ICC decision involving the identical question here presented.[1] The court concluded:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

Id. at 258. Because the applicant had made no such showing, the case was remanded for reconsideration in the light of *American Trucking Associations.*[2]

---

[1] The Commission recognizes that the facts in *Steere I* "are substantially similar to the facts in this case," but argues that the Steere decision "imposes an unreasonable burden upon applicants for restriction removal."

[2] The same question was raised in *Steere Tank Lines, Inc.* v. *I.C.C.*, 667 F.2d 490 (5 Cir. 1982) (*"Steere II"*). Again recognizing the necessity of finding an applicant "fit, willing,

We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal *sub silentio* § 10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I*, *supra*. The term "reasonably broaden", as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing, and able."

The Commission properly noted that the scope of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," 5 U.S.C. § 706(2)(A). We recognize that under this standard the scope of review is a narrow one. The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). "[A] finding that a decision is not 'arbitrary or capricious' clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence. . . ." *Doe* v. *Hampton*, 566 F.2d 265, 271 n. 15 (D.C. Cir. 1977).

Although Port Norris' application detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, no where does it indicate that Port Norris is "fit, willing, and able to provide the transportation authorized by the certificate." The ICC's decision to grant the application is likewise void of any consideration of these "relevant factors". Absent such a consideration, it cannot be said that the ICC "*reasonably* broadened" the

---

and able" to provide expanded service, the case was dismissed as moot after the ICC granted a new certificate in which the applicant was determined to be "fit, willing, and able" to provide bulk service in separate proceedings on the new application.

categories of property authorized by the applicant's certificate. Its decision was arbitrary because the Commission failed to consider the relevant factor of whether the applicant was "fit, willing, and able" to perform the expanded service.

We agree also with the holding in *Steer I*, *supra*, that the showing that an applicant is fit, willing, and able "need not be elaborate" and that the form and details of the showing "are, in the first instance matters that should be addressed to the Interstate Commerce Commission." Specifically, the time restraints of the Act contemplate the use of expedited procedures in restriction removal cases. *American Trucking Associations*, 659 F.2d 461.[3] The ICC retains broad discretion, within statutory limits, to define appropriate commodity categories. *Id.* at 464-65. Likewise, it has discretion in determining what facilities and equipment may be required.[4]

We vacate the order under review and remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

---

[3] The Commission correctly notes that "Congress did not intend to invoke the full panoply of APA formal hearing requirements" and that the APA does not "require full-fledged adversary-type hearings in restriction removal cases."

[4] We agree with the Commission that an applicant should not "be compelled to buy all equipment necessary to transport every conceivable commodity encompassed by the expanded authority before the applicant even receives the authority it seeks."

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1023

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

---

Argued December 2, 1982

Decided January 14, 1983

Chester A. Zyblut, with whom *Michael D. Bromley*, was on the brief for petitioner.

Craig M. Keats, Attorney, Interstate Commerce Commerce Commission, with whom *John Broadley*, General Counsel, *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, *Robert B. Nicholson* and *William J. Roberts*, Attorneys, Department of Justice, were on the brief for respondents.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

William P. Jackson, Jr. and *David C. Reeves*, were on the brief for intervenor.

Before: GINSBURG and SCALIA, *Circuit Judges*, and GESELL,* *United States District Judge* for the District of Columbia.

Opinion PER CURIAM.

PER CURIAM: Ritter Transportation, Inc. ("Ritter") seeks to set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co., Inc. ("Port Norris") to broaden the commodities its certificate of public convenience and necessity permits it to carry. A certificate served June 18, 1980, authorized Port Norris to transport "*(1) sand, gravel, clay, and stone*, and *(2) materials* used in the manufacture and distribution of glass, in bulk," within a specified territory. Appendix (App.) 3-4; 45 Fed. Reg. 53586 (1980). On July 2, 1981, Port Norris applied, pursuant to the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), to broaden its authority to transport "*(1) sand, (2) clay, concrete, glass or stone products*, and *(3) commodities in bulk*," within the same territory. App. 6. Notice of Port Norris' application was published in the Federal Register and Ritter submitted adverse comments. The ICC's Restriction Removal Board granted Port Norris' application on September 21, 1981, App. 39; Ritter's appeal to the Commission was denied on December 15, 1981. App. 84. Ritter then petitioned for review in this court as authorized by 28 U.S.C. § 2342(5).

Ritter contends that the ICC unlawfully failed to consider whether Port Norris is "fit, willing, and able" to carry all "commodities in bulk." For the reasons set forth in *Ritter Transportation, Inc. v. ICC*, 684 F.2d 86 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3448 (U.S. Oct. 4, 1982) (No. 82-594) ("*Ritter I*"), we agree. Accordingly, we vacate the ICC's order granting

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Port Norris' application and remand to the Commission for further proceedings.

In *Ritter I*, we held that the ICC's restriction removal mandate under the Motor Carrier Act of 1980 to "reasonably broaden the categories of property authorized by the carrier's certificate," 49 U.S.C.A. § 10922(h)(1)(B)(i), entails consideration whether the applicant is "fit, willing, and able" to provide the additional transportation for which it seeks authorization. 684 F.2d at 87. In so holding, we aligned this Circuit with precedent initiated in the Fifth Circuit, most immediately, *Steere Tank Lines, Inc. v. ICC*, 666 F.2d 255 (5th Cir. 1982), *reh'g denied*, 671 F.2d 1380 (March 8, 1982), *petition for cert. filed*, 51 U.S.L.W. 3013 (U.S. July 9, 1982) (No. 82-41) (*"Steere I"*). The parties in the case before us (*"Ritter II"*) are the same as in *Ritter I* and the issues raised are substantially the same.

Ritter I involved another certificate held by Port Norris; the certificate's commodities' authorization was broadened from "cullet in bulk" (broken glass) to "commodities in bulk." Our remand in *Ritter I* required Port Norris to show its fitness to perform the expanded service. We emphasized, however, that the fitness showing need not be detailed and that the Commission should use expedited procedures in ruling on commodity broadening requests.

The ICC's decision to broaden Port Norris' certificate in *Ritter II* was reached before *Steere I* and *Ritter I* were decided, and, in accordance with Commission policy in effect at that time, was not predicated on a finding that Port Norris was "fit" to carry "all commodities." The ICC now contends that such a finding was implicit in its decision. The Commission attempts to distinguish *Ritter I* by pointing to the different scope of the certificate Port Norris initially held in that case. In *Ritter I* Port Norris started with authority limited to one commodity, "cullet in bulk." In *Ritter II* Port Norris' origi-

nal certificate included all bulk materials used in glass manufacturing and distribution, as well as sand, gravel, clay, and stone.

We find the attempted distinction unpersuasive. Even if the ICC might reasonably have inferred that Port Norris was "fit" to carry all bulk commodities merely from the breadth of its prior authority to carry numerous itemized bulk commodities, there is no evidence in the record to suggest that the Commission ever considered or made such an inference.[1]

Ritter seeks further relief also sought, but not addressed by the panel, in *Ritter I*.[2] Ritter argues that the notice published in connection with Port Norris' application, 46 Fed. Reg. 37353 (1981), was deficient because it specified only the change in the commodities Port Norris sought authorization to carry, not the territory served. The ICC answers that existing regulations prescribe the scope of notice that is appropriate, and do not require a description of the affected territory when no change in that territory is sought. *See* 49 C.F.R. §§ 1137.10(b)(6), .11.[3] The Commission points out that any person

---

[1] We note here, as we did in *Ritter I*, 684 F.2d at 87-88 n.2, that the ICC has commenced to determine, in restriction removal cases, the applicant's fitness for expanded commodities service. Steere Tank Lines, Inc. v. ICC, 667 F.2d 490 (5th Cir. 1982) ("*Steere II*"). We do not rule out Commission development of guidelines to facilitate these determinations. Prior operations of a described kind might well serve as a sufficient indicator of fitness for certain expansions.

[2] In *Ritter I*, the issue was initially raised in court; here, the argument was first tendered to the Commission.

[3] Ritter's counsel suggested at oral argument that the notice published in connection with Port Norris' application was exceptional in its failure to describe the territory affected, and stated that of the 48 other removal restriction applications published in the Federal Register with Port Norris', 46 included a description of territories. Brief for Petitioner at 45. The ICC's counsel answered that the notice of Port Norris' application was in the regular form for applications of its

may check an applicant's filing with the ICC to ascertain what territories it involves. *See* 49 C.F.R. § 1137.11.

A territorial description in *all* Federal Register notices of restriction removal applications might indeed help members of the public determine when they are interested in an application, without imposing a significant burden on the ICC or carriers applying for restriction removal. However, the issue is not properly presented in the instant proceeding. The courts of appeals have jurisdiction to provide direct review of ICC regulations, 28 U.S.C. § 2342(5), but such review must be sought within sixty days after the regulations issue in final form. 28 U.S.C. § 2344. The regulation challenged here issued December 31, 1980, 45 Fed. Reg. 86757; Ritter's petition for review was filed in this court on January 7, 1982. Ritter's petition is therefore not a timely request for direct review of the ICC's notice regulation.

Nor is this an appropriate occasion for indirect review of the regulation on the ground that Ritter was aggrieved by inadequate notice attending the ICC's December 15, 1981, final approval of Port Norris' restriction removal application. Ritter concedes that it had actual, timely knowledge of the territory in which Port Norris had authority to operate. Carriers seeking more informative Federal Register notice, however, are not left without a means to air their complaint. They may petition the ICC for rulemaking to amend 49 C.F.R. § 1137.11, the notice regulation. 5 U.S.C. § 553(e). If the ICC rejects such a petition, judicial review of that final order would be appropriate. *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807 (D.C. Cir. 1981).

The order under review is vacated and this matter is remanded to the Interstate Commerce Commission for further proceedings consistent with this opinion.

---

type; the applications that included territorial descriptions involved requested changes in the territories served.